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ATTORNEY FOR APPELLANT:

JEFFREY SCHLESINGER
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FELICIA D. GORDON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 45A03-0606-CR-281
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0503-MR-2

March 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Felicia Gordon (“Felicia”) appeals the sentence imposed by the trial court following her plea of guilty to Class B felony neglect of a dependent.

We affirm.

ISSUE

Whether the trial court abused its discretion when it considered the victim’s age, an element of the offense, as an aggravator in imposing sentence.

FACTS

Felicia resided in Gary with her boyfriend, Timothy Hampton (“Timothy”) and Felicia’s three children: G.R., A.R. and A.G. On March 16, 2005, G.R. told Felicia that he was not feeling well and refused to eat his dinner at the kitchen table. When Felicia insisted that G.R. finish his dinner, G.R. refused and slammed his spoon on the table, complaining that his stomach and throat hurt. Timothy ordered G.R. from the kitchen table and into the bathroom, following him inside. Felicia heard G.R. scream as Timothy threw him against the bathroom wall. Felicia also saw Timothy kick G.R. in the stomach. Timothy then told G.R. to go into the bedroom where Timothy continued to beat G.R.. By now, G.R. was unable to walk. Timothy dragged G.R. into the living room, and “stood G.R. [sic] up.” (Felicia’s App. 112). Because G.R. could not walk, Timothy punched G.R. in the chest, stomach and back. *Id.*

Felicia “did not intervene or make efforts to prevent the beating.” *Id.* Eight hours later, she notified the authorities. When police arrived on the scene, Felicia told them that a man named “Rick Silver” had beaten G.R.. *Id.* at 13. Felicia also told her

daughter, A.R., to lie about Timothy's identity. Soon thereafter, emergency personnel arrived on the scene, but G.R. was dead. A Lake County pathologist later determined that G.R. died from "multiple blunt force trauma to his head, neck, chest, abdomen, back, buttocks, arms and legs, and a laceration of his liver." *Id.* at 112.

On March 18, 2005, the State filed an information and probable cause affidavit charging Felicia with murder, as a class A felony, and neglect of a dependent, as a class B felony. The State later amended its charging information, adding a count of class A felony neglect of a dependent. On May 20, 2005, the State filed a second amendment of charges, this time replacing the class B felony neglect count with a count of battery as a class A felony. The matter was initially slated for trial on October 3, 2005. However, after the trial court granted a series of continuances to the parties, it ultimately rescheduled the trial for March 20, 2006.

On March 14, 2006, Felicia entered into a plea agreement with the State, and stipulated to a factual basis for the plea. Pursuant to the agreement, Felicia pled guilty to neglect of a dependent as a class B felony. The parties were free to argue the sentencing terms, but agreed to cap the maximum sentence at fifteen years to any sentence that the trial court imposed. At the sentencing hearing on May 26, 2006, the trial court stated "the child was seven years of age at the time of the beating and certainly at the time of death. That's an aggravating factor, and I do accept that as an aggravating factor." *Id.* at 119. The trial court then ordered Felicia to serve a ten-year sentence in the Department of Correction, from which order Felicia now appeals.

DECISION

Felicia contends that the trial court abused its discretion when it considered G.R.'s age as an aggravating factor for purposes of sentencing. Specifically, she argues that because G.R.'s age was a material element of the offense, her sentence cannot stand.¹ She urges us to “reverse the sentencing decision . . . and remand with instructions to impose a sentence less than the advisory sentence.” Felicia’s Br. 6.

Sentencing decisions are within the trial court’s discretion and will be reversed only for an abuse of discretion. *Nybo v. State*, 799 N.E.2d 1146, 1150 (Ind. Ct. App. 2003), *trans. denied*. This decision includes the determination of whether to increase presumptive penalties, which can be supported by a single aggravating circumstance. *Id*; *Bocko v. State*, 769 N.E.2d 658 (Ind. Ct. App. 2002), *trans. denied*. When the trial court imposes a sentence other than the advisory (presumptive) sentence,² we examine the trial court’s sentencing order and its statements at the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. *Id*. The trial court’s sentencing statement must contain the following elements: (1) all significant aggravating and mitigating circumstances; (2) the specific reason why each circumstance is deemed

¹ Felicia argues further that “[b]ecause the aggravating factor was [allegedly] inappropriate, the mitigating factors should have outweighed the aggravating factors.” Felicia’s Br. 6. We disagree. Trial courts are not required to give the same weight or credit to mitigating evidence as defendants do. *Moore v. State*, 827 N.E.2d 631, 642 (Ind. Ct. App. 2005), *reh’g denied, trans. denied*.

² Indiana Code section 35-20-2-5 was amended in 2005 to replace the word “presumptive” with “advisory,” reflecting the changes made to the Indiana sentencing statutes in response to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *reh’g denied*. However, regardless of which version of the statute is applied, the substance of the statute upon which Felicia bases her argument was unaffected by the amendments.

aggravating and mitigating; and (3) a demonstration that the aggravating and mitigating circumstances have been evaluated and balanced. *Id.* at 296.

Indiana's neglect of a dependent statute provides that

- (a) A person having the care of a dependent whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally: (1) places the dependent in a situation that endangers the dependent's life or health . . . commits neglect of a dependent, a Class D felony.
- (b) However, the offense is: . . . (2) a Class B felony if it is committed under subsection (a)(1) . . . and results in serious bodily injury.

I. C. § 35-46-1-4; *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). In addition, Indiana Code section 34-46-1-1 defines a "dependent" as "an unemancipated person who is under eighteen years of age."

Here, the trial court designated the following aggravating factors when it imposed Felicia's sentence:

AGGRAVATING CIRCUMSTANCES: The Court considers the following factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

As reflected in the stipulated factual basis.

1. [Felicia] attempted to conceal the perpetration of the crime by giving law enforcement a false name.
2. The victim [G.R.] died as a result of the neglect to which [Felicia] plead[ed] guilty.
3. The victim was seven (7) years of age.

(Felicia's App. 115-116) (emphasis added). The trial court also found the following mitigators:

MITIGATING CIRCUMSTANCES: The Court considers the following factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

1. [Felicia] has no history of delinquency or criminal activity.
2. [Felicia] has pled guilty and admitted responsibility.
3. [Felicia] has mental health issues as reflected in the reports and information submitted by [Felicia].

Id. The trial court found that the mitigating factors were equal to the aggravating factors and imposed the advisory (presumptive) sentence of ten years.

In *Edwards*, a fifteen-month-old girl died from blunt force trauma after being struck repeatedly. Edwards pled guilty to neglect of a dependent. At the sentencing hearing, the trial court identified the victim's age as an aggravating circumstance and imposed a fifteen-year sentence. On appeal, Edwards argued – as Felicia does here – that because the victim's age was a material element of the charged offense, the trial court abused its discretion when it considered the victim's age as an aggravating factor. We rejected Edwards' contention, finding that although the age of the victim generally may not be used as an aggravating factor, “a trial court is permitted to consider the particularized factual circumstances of the case to be an aggravating factor.” *Edwards*, 842 N.E.2d at 854. We also noted that under Indiana Code section 35-38-1-7.1(a)(4), “whether the victim was less than twelve years old . . . is a mandatory consideration of the sentencing court.”

Here, as in *Edwards*, the record indicates that the trial court considered G.R.'s age as a valid aggravating circumstance in relation to the brutal nature and circumstances of the crime. Felicia admittedly failed to intervene as Timothy, an adult, dragged, punched, and kicked her seven-year-old son. Moreover, she waited eight hours to alert emergency

medical personnel even though G.R. was visibly injured. Thus, we conclude that the trial court did not err in considering G.R.'s age as an aggravating factor in this case.

Affirmed.

BAKER, C.J., concurs.

ROBB, J., concurs in result.